Michael K. Jeanes, Clerk of Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2011-000814-001 DT 05/21/2012

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT
K. Waldner
Deputy

STATE OF ARIZONA

SETH W PETERSON

v.

TERRY LEE THOMSON (001)

SIMONE ANNE ATKINSON

REMAND DESK-LCA-CCC
SCOTTSDALE MUNICIPAL COURT

RECORD APPEAL RULING / REMAND

Lower Court Case Number M–0751–TR–2011–007175.

Defendant-Appellant Terry Thomson (Defendant) was convicted in Scottsdale Municipal Court of driving under the influence. Defendant contends the trial court erred in denying his Motion To Dismiss, which alleged the conduct of the officer violated his right to counsel. For the following reasons, this Court affirms the judgment and sentence imposed.

I. FACTUAL BACKGROUND.

On March 22, 2011, Defendant was cited for driving under the influence, A.R.S. § 28–1381(A)(1) & (A)(2); improper left turn, A.R.S. § 28–751(2); driving without lights at night, A.R.S. § 28–922; and failure to wear lap and shoulder belt, A.R.S. § 28–909(A)(1). Prior to trial, Defendant filed a Motion To Dismiss that alleged the conduct of the officer violated his right to counsel.

At the hearing on Defendant's motion, Officer David Stanley testified he was on duty on March 22, 2011. (R.T. of June 20, 2011, at 4.) At 2:00 a.m., he was in the area of 72nd Place and Shea Boulevard when he made a traffic stop on a white Nissan Altima. (*Id.* at 4–5.) He identified Defendant as the driver of that vehicle. (*Id*. at 5.) He observed Defendant had a flushed face, bloodshot watery eyes, and the odor of alcohol, so he had him do some field sobriety tests. (*Id*. at 5–6.) As a result of those tests and his observations, at 2:19 a.m., Officer Stanley arrested Defendant. (*Id*. at 6.)

Once Officer Stanley arrested Defendant, he read to him the Admin Per Se/Implied Consent Affidavit (APS/ICA), and Defendant agreed to a blood draw. (R.T. of June 20, 2011, at 6, 10–11, 14.) Officer Stanley took Defendant to Scottsdale Healthcare on Shea Boulevard and gave him Scottsdale Healthcare's waiver of liability and consent form, and allowed Defendant to read that form. (*Id.* at 6–7, 10–11.) After about 2 minutes, Defendant asked Officer Stanley to read to him again the APS/ICA, which Officer Stanley did. (*Id.* at 7, 14.) Officer Stanley asked him if he understood what he was reading to him; Defendant said he did not; Officer Stanley asked him what part did he not understand; Defendant said, "That." (*Id.* at 7, 14–15.) Officer Stanley tried to explain it to Defendant multiple times more, but Defendant was very evasive about what he did not understand. (*Id*. at 7, 11.) Officer Stanley then read the APS/ICA to Defendant a third time. (*Id*. at 7, 14.) After they had been talking for about 5 minutes, Defendant asked, "Should I talk to a lawyer?" (*Id*. at 7–8, 15–16.) Officer Stanley responded he could not give legal advice. (*Id*. at 8.) Defendant then asked if he could have his cell phone, and Officer Stanley said he could not. (*Id*. at 8–9, 19.) Officer Stanley gave two reasons for this: (1) Defendant had been antagonistic to him and he did not want to give to Defendant anything he could throw at him and (2) they were inside the hospital and the cell phone was outside in the patrol car. (*Id.* at 9, 16–17.) Officer Stanley said that, when Defendant asked for his cell phone, he did not ask to make a telephone call and he did not ask to speak to an attorney. (*Id*. at 9.) After that, they went over the APS/ICA and the hospital consent form, and Defendant agreed to give the blood draw, which took place at 3:13 a.m. (*Id*. at 9–10, 11.) Prior to the time of the blood draw, Defendant never asked to speak to an attorney. (*Id*. at 10.)

After the blood draw, Officer Stanley took him to a desk and discussed with him the blood destruction notice, the interview questions, and the vehicle impound report. (R.T. of June 20, 2011, at 10.) Officer Stanley then took Defendant to the District 2 jail facility, and after processing, placed him in the telephone room. (*Id*. at 10, 11–12, 18.) Officer Stanley advised Defendant about the telephone books, explained how to use the telephone and how to leave call-back numbers, and asked Defendant if he needed any numbers out of his cell phone. (*Id*. at 12.) Defendant said he wanted the home number for someone named Susie, which Officer Stanley provided. (*Id*. at 12–13.) Ultimately, Defendant was released on bond. (*Id*. at 13.) During this whole process, Defendant never asked for an independent blood draw or the collection of any other type of evidence, or asked to speak to an attorney. (*Id*. at 13, 19.)

Defendant acknowledged Officer Stanley read to him the APS/ICA, but contended he did not understand any part of it. (R.T. of June 20, 2011, at 21–22.) Defendant acknowledged he asked, "Should I talk to a lawyer" and Officer Stanley responded he could not give legal advice. (*Id*. at 23, 28–29.) He contended, however, he did ask to make a telephone call and said he wanted to call an attorney. (*Id*. at 23–24.) He admitted that, when he asked for his cell phone, he did not tell Officer Stanley why he wanted his cell phone. (*Id*. at 29–30.) And he further admitted the reason why he wanted to talk to an attorney was to ask about the hospital liability waiver. (*Id*. at 30.) He further said the person named Susie was a police officer. (*Id*. at 31.)

After hearing the testimony and the arguments of counsel, the trial court took the matter under advisement. (R.T. of June 20, 2011, at 34, 35, 37, 38.) On July 11, 2011, the trial court issued a Minute Entry wherein it concluded a suspect must make an unequivocal request for an attorney in order to invoke the right to an attorney. (M.E. of July 11, 2011, at 1.) It found Defendant never asked for an attorney, but instead only asked questions, which it concluded was not a request for an attorney. (*Id*.) The trial court therefore denied Defendant's Motion To Dismiss.

Defendant then submitted the matter on the record, which included the fact that Defendant's BAC was a 0.129. The trial court found Defendant guilty of the two DUI charges and responsible for the civil traffic offenses. On September 28, 2011, trial court imposed sentence, and on that same day, Defendant filed a timely notice of appeal. This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12–124(A).

II. ISSUE: DID THE TRIAL COURT ABUSE ITS DISCRETION IN FINDING DEFENDANT DID NOT MAKE A SUFFICIENT REQUEST FOR COUNSEL.

Defendant contends the trial court erred in finding he did not make a sufficient request for counsel. In reviewing a trial court's ruling on a motion to dismiss, an appellate court is to defer to the trial court's factual determinations, including findings based on a witness's credibility and the reasonableness of inferences the witness drew, but is to review de novo the trial court's legal conclusions. *State v. Moody*, 208 Ariz. 424, 94 P.3d 1119, ¶¶ 75, 81 (2004); *State v. Gonzalez-Gutierrez,* 187 Ariz. 116, 118, 927 P.2d 776, 778 (1996); *State v. Olm,* 223 Ariz. 429, 224 P.3d 245, ¶ 7 (Ct. App. 2010). Based on this Court's review of the record, this Court concludes the trial court properly denied Defendant's Motion To Dismiss.

A. *The Sixth Amendment to the United States Constitution.*

In order to determine whether the trial court was correct in finding that Defendant did not make a sufficient request for counsel, it is necessary to determine which right to an attorney Defendant actually had at that point. The Sixth Amendment grants to a defendant the right to counsel, but that right to counsel does not attach until after the initiation of formal charges:

> The Sixth Amendment right to counsel attaches only at the initiation of adversary criminal proceedings, and before proceedings are initiated a suspect in a criminal investigation has no constitutional right to the assistance of counsel.

Davis v. United States, 512 U.S. 452, 456–57 (1994) (citations omitted); *accord, Montejo v. Louisiana,* 556 U.S. 778, ___ 129 S. Ct. 2079, 2085 (2009) ("[O]nce the adversary judicial process has been initiated, the Sixth Amendment guarantees a defendant the right to have counsel present at all 'critical' stages of the criminal proceedings."); *Moran v. Burbine,* 475 U.S. 412, 431 (1986) ("[T]he Sixth Amendment right to counsel does not attach until after the initiation of formal charges."); *Brewer v. Williams,* 430 U.S. 387, 398 (1977) ("[T]he right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him 'whether by

way of formal charge, preliminary hearing, indictment, information, or arraignment.'"), *quoting Kirby v. Illinois,* 406 U.S. at 682, 689 (1972); *Massiah v. United States,* 377 U.S. 201, 205 (1964); *State v. Martinez,* 221 Ariz. 383, 212 P.3d 75, ¶ 11 (Ct. App. 2009) ("The Sixth Amendment right to counsel is triggered 'at or after the time that judicial proceedings have been initiated.' "), *quoting Fellers v. United States,* 540 U.S. 519, 523 (2004).

In the present matter, the State did not file any charges against Defendant until after the events in question took place. Thus, at the time of the events in question, Defendant's right to counsel under the Sixth Amendment had not yet attached, so Defendant could not have been asking for an attorney under the Sixth Amendment of the United States Constitution.

B. *Article 2, Section 24, of the Arizona Constitution.*

Article 2, Section 24, also grants to a defendant the right to counsel. Although this Court is not aware of any case that holds this right to counsel under the Arizona Constitution does not attach until after the initiation of formal charges, in *State v. Transon,* 186 Ariz. 482, 924 P.2d 486 (Ct. App. 1996), the court stated as follows:

> We have been unable to locate any authority for appellee's assertion that Arizona's right to counsel is broader than the federal right. Where, as here, the language of the federal and state constitutional provisions are substantially similar, we will use the same standard to analyze both provisions.[2]
>
> [2] *Compare* U.S. Const. amend. VI ("the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense.") *with* Ariz. Const. art. 2, § 24 ("the accused shall have the right to appear and defend in person, and by counsel . . .").

186 Ariz. at 485 & n.2, 924 P.2d at 489 & n.2. Because (1) both the Sixth Amendment and Article 2, Section 24, use the term "the accused" and (2) both provisions contain essentially the same rights and (3) the provisions in Article 2 Section 24, describe events that happen after the State has charged a defendant in a criminal matter, this Court concludes a defendant's right to counsel under Article 2, Section 24, of the Arizona Constitution does not attach until after the initiation of formal charges. Again, in the present matter, the State did not file any charges against Defendant until after the events in question took place. Thus, at the time of the events in question, Defendant's right to counsel under Article 2, Section 24, had not yet attached, so Defendant could not have been asking for an attorney under Article 2, Section 24, of the Arizona Constitution.

C. *Miranda v, Arizona and the Fifth Amendment to the United States Constitution.*

In *Miranda v, Arizona,* 384 U.S. 436 (1966), the Court held a suspect subjected to custodial interrogation has the right to consult with an attorney and to have counsel present during questioning, but has made it clear that right to an attorney is not a right granted by the United States Constitution:

> [W]e held in *Miranda* that a suspect subject to ***custodial interrogation*** has the right to consult with an attorney and to have counsel present during questioning, and that the police must explain this right to him before questioning begins. The right to counsel established in *Miranda* was one of a "series of recommended 'procedural safeguards' . . . [that] ***were not themselves rights protected by the Constitution*** but were instead measures to insure that the right against compulsory self-incrimination was protected."

Davis, 512 U.S. at 457 (1994) (citations omitted, emphasis added). The Court further held the taking of a suspect's blood, even against the suspect's wishes, was not testimonial, and thus the Fifth Amendment and *Miranda* did not apply:

> Not even a shadow of testimonial compulsion upon or enforced communication by the accused was involved either in the extraction or in the chemical analysis. Petitioner's testimonial capacities were in no way implicated; indeed, his participation, except as a donor, was irrelevant to the results of the test, which depend on chemical analysis and on that alone. Since the blood test evidence, although an incriminating product of compulsion, was neither petitioner's testimony nor evidence relating to some communicative act or writing by the petitioner, it was not inadmissible on privilege [against self-incrimination] grounds.
>
> This conclusion also answers petitioner's claim that, in compelling him to submit to the test in face of the fact that his objection was made on the advice of counsel, he was denied his Sixth Amendment right to the assistance of counsel. Since petitioner was not entitled to assert the privilege [against self-incrimination], he has no greater right because counsel erroneously advised him that he could assert it. His claim is strictly limited to the failure of the police to respect his wish, reinforced by counsel's advice, to be left inviolate. No issue of counsel's ability to assist petitioner in respect of any rights he did possess is presented. The limited claim thus made must be rejected.

Schmerber v. California, 384 U.S. 757, 765–66 (1966) (footnote omitted); *accord, South Dakota v. Neville*, 459 U.S. 553, 554 (1983) ("*Schmerber* held that a State could force a defendant to submit to a blood-alcohol test without violating the defendant's Fifth Amendment right against self-incrimination.") As a result, Arizona has held *Miranda* warnings are not required prior to asking a suspect to submit to a BAC test:

> "*Miranda* is not applicable to evidence obtained from a breathalyzer test since *Miranda* is 'bottomed on the privilege against self-incrimination and bars the use of communications by or testimonial utterances of a person unless and until the four-fold warning has been given and applied. A breathalyzer test is unrelated to a communication by the subject.' "
>
> . . . .
>
> Accordingly, we hold that *Miranda* warnings were not required prior to requesting that defendant submit to the intoxilyzer test.

State v. Lee, 184 Ariz. 230, 233–34, 908 P.2d 44, 47–48 (Ct. App. 1995) (citations omitted). Because Defendant had no federal constitutional right to consult with an attorney prior to taking the BAC test, so Defendant could not have been asking for an attorney under *Miranda.*

D. *Rule 6.1(a) of the Arizona Rules of Criminal Procedure.*

The Arizona Supreme Court has promulgated Rule 6.1(a) of the Arizona Rules of Criminal Procedure, which provides in part, "The right to be represented [by counsel] shall include the right to consult in private with an attorney, or the attorney's agent, as soon as feasible after a defendant is taken into custody . . . ." That right is not a restatement of the Sixth Amendment right to counsel because, as noted above, "The Sixth Amendment right to counsel attaches only at the initiation of adversary criminal proceedings, and before proceedings are initiated a suspect in a criminal investigation has no constitutional right to the assistance of counsel." *Davis*, 512 U.S. at 456–57; *accord, State v. Tresize*, 127 Ariz. 571, 575, 623 P.2d 1, 5 (1980). ("The law is quite clear in this area that pre-indictment lineups and showups are not a critical stage of the proceedings requiring the presence of counsel.")

This right to counsel established in Rule 6.1(a) appears instead to be a procedural safeguard that is not in itself a right protected by the Constitution, but instead a measure to insure the due process right to gather exculpatory evidence is protected, as explained by the Arizona Supreme Court in *State v. Moody*, 208 Ariz. 424, 94 P.3d 1119 (2004), a case in which Moody was convicted of first-degree murder and sentenced to death. Moody was arrested in California and extradited to Arizona. *Id* at ¶ 11. Shortly after he arrived in Arizona, detectives served a search warrant on him seeking "physical characteristics" and handwriting samples. *Id* at ¶ 61. Moody asked for an attorney, but the detectives denied his request, and Moody then gave hair, blood, and handwriting samples, and the detectives fingerprinted and photographed him. *Id*. Moody was then indicted. *Id* at ¶ 12. On appeal, Moody claimed the detectives violated his rights under the Sixth Amendment and Rule 6.1(a). The Arizona Supreme Court held there was no Sixth Amendment violation because that only extends to "all critical stages of the criminal process," and the taking of non-testimonial physical evidence is not a critical stage of the proceedings. *Id* at ¶ 65. The court then explained why there was no violation of Rule 6.1(a):

> Second, Moody argues that by refusing his custodial request to speak with counsel before the taking of the physical evidence, the State interfered with his rule-based "right of access to counsel" and that the evidence should therefore have been suppressed. Rule 6.1(a) of the Arizona Rules of Criminal Procedure provides a criminal defendant with the right to "consult in private with an attorney . . . as soon as feasible after [being] taken into custody." This court has stated that, regarding a suspect in custody, the state may deny the right to consult with an attorney "only when the exercise of that right will hinder an ongoing investigation." *Kunzler v. Pima County Superior Court.* Although the State has not shown that counsel would have hindered the investigation in this case, Moody had not been assigned an attorney when the warrant was

served. This court has also stated that "[i]f the defendant is indigent and cannot afford an attorney, the state need not wait until one is appointed before continuing its detention procedures." *McNutt v. Superior Court.* The taking of the fingerprint evidence would clearly qualify under this exception for detention procedures.

Even if this court were to conclude that Moody's right to consult counsel under Rule 6.1(a) was violated for the other evidence, however, Moody fails to demonstrate that suppression would be required. Federal jurisprudence is clear that if evidence could have been obtained despite the violation of right to counsel, there is no reason to keep that evidence from the jury. *Nix v. Williams.* For suppression to be appropriate, there must be a nexus between the violation and the evidence seized. *Id*. (stating that the exclusionary rule requires the suppression of evidence gained as a result of a government violation of a defendant's rights). In Moody's case, the physical evidence was seized pursuant to a valid warrant, and the samples would have been collected whether or not Moody had an opportunity to speak with an attorney. Consequently, the nexus between the alleged violation and the evidence seized is absent; therefore, the policies underlying the exclusionary rule would not require suppression of this evidence.

Moody relies on a line of cases based on Rule 6.1 of the Arizona Rules of Criminal Procedure for the proposition that a defendant has the right to confer with counsel before taking a test for physical evidence. Those cases, however, all involve and are limited to the seizure of evidence of intoxication. *See, e.g., Kunzler*; *Holland*; *McNutt*; *Rosengren.* Only in these cases has the reviewing court either dismissed the charges against the defendant or affirmed suppression of non-testimonial, physical evidence as a sanction for the state's violation of a defendant's rights under Rule 6.1(a).

These cases addressed violations of Rule 6.1 in the context of impaired drivers. *See Kunzler*; *Holland*; *McNutt*; *Rosengren* (manslaughter). Such investigations raise unique concerns that justify exemption from the general rule:

> In a D[U]I investigation, it is crucial for both the state and the defendant to gather evidence relevant to intoxication close in time to when the defendant allegedly committed the crime. Otherwise, any alcohol that may have been in the blood will have decomposed before the blood can be tested.

McNutt, 133 Ariz. at 10 n. 2, 648 P.2d at 125 n. 2. As the court suggested in *McNutt*, DUI investigations are unique because of the evanescent nature of blood- and breath-alcohol evidence. Thus, these DUI cases establish the required nexus between the violation and remedy: Denial of counsel may deprive a defendant of an opportunity to obtain exculpatory evidence and therefore justifies suppression of evidence.

Moody's case differs in that the physical evidence taken from him was not subject to disappearing or dissipating as is breath- or blood-alcohol evidence. The officers made it clear that the warrant sought only non-testimonial evidence and that they would not be asking Moody any questions regarding the murders while taking the evi-

> dence. Additionally, because the evidence was seized pursuant to a valid warrant, it is unlikely that an attorney would advise Moody to defy the warrant and refuse to submit to the search. For those reasons, we agree with those courts that have held that the necessity for counsel was minimized. *E.g., Nix*. Consequently, even if Rule 6.1(a) requires that a defendant be afforded the opportunity to contact counsel before administration of a search warrant for physical characteristics, Moody has failed to demonstrate why suppression would be appropriate in this case. He therefore has not shown that the trial court abused its discretion in denying his motion to suppress the physical evidence.

Moody at ¶¶ 66–70 (citations omitted). The Arizona Supreme Court thus held that Moody, who was convicted of first-degree murder and received the death penalty, had no right "to consult in private with an attorney . . . as soon as feasible after a defendant is taken into custody," while a person arrested for DUI does have that right. It thus appears this right to consult with an attorney as soon as feasible after being taken into custody is not a component of any specific grant of a right to counsel, but instead is a procedure provided to ensure a defendant who is arrested for DUI is able to exercise a due process right to gather exculpatory evidence before it disappears. As stated by the Arizona Court of Appeals:

> Appellee also correctly asserts that a right to counsel component is contained within Arizona's constitutional Due Process Clause. The right to counsel is an extension of the doctrine that defendants have the right to gather independent exculpatory evidence. Arizona's Due Process Clause guarantees DUI suspects "a fair chance to obtain independent evidence of sobriety essential to his defense at the only time it [is] available." *Montano v. Superior Court.* Numerous Arizona cases have found due process violations where police conduct interfered with a defendant's right to gather evidence of sobriety before the evidence naturally dissipates. The right to a fair chance to gather exculpatory evidence includes reasonable access to counsel.

Transon, 186 Ariz. at 485, 924 P.2d at 489 (citations omitted).

Based on that rule, the Arizona Supreme Court has held a suspect has the right to consult with an attorney prior to deciding whether to take a BAC test, provided that consultation does not disrupt an ongoing investigation by the police. *State v. Juarez,* 161 Ariz. 76, 80, 775 P.2d 1140, 1144 (1989). The Arizona Supreme Court did not, however, explain how this right to counsel, which was needed to protect a suspect's due process right to obtain exculpatory evidence, morphed into a right to counsel to assist a suspect in determining whether to refuse to comply with the statutory requirement to submit to a BAC test under the implied consent statute. And it seems contrary to the holding in *Schmerber* that a suspect does not have a federally guaranteed right to counsel when the state forces a suspect to give a blood sample. But that is what the Arizona Supreme Court has said the procedure is and that is the procedure the lower courts must follow.

E. *Invocation of the right to consult with an attorney.*

Although the Arizona Supreme Court has held a suspect has the right to consult with an attorney prior to deciding whether to take a BAC test, it has not held a suspect has the right to consult with an attorney so the attorney can explain a hospital's waiver of liability and consent form. In the present case, Defendant said the reason he wanted to speak to an attorney was to ask about the hospital liability waiver. (R.T. of June 20, 2011, at 30.) Thus, Defendant's unspoken desire to consult with an attorney to discuss the hospital liability waiver is not a right the Arizona Supreme Court has explicitly recognized.

Assuming the right to consult with an attorney to discuss the hospital liability waiver equate to the right to consult with an attorney prior to deciding whether to take a BAC test, the question then is whether Defendant properly invoked that right. The right to consult with an attorney prior to deciding whether to take a BAC test is not self-effectuating, and instead comes into effect only when a defendant asserts the right to an attorney:

> [A]ppellee's right to counsel [under Rule 6.1(a)] cannot be infringed upon unless appellee actually asks for an attorney.

Transon, 186 Ariz. at 486, 924 P.2d at 490. Although the Arizona courts have not stated what level of certainty is required for a suspect to have been considered as asking for an attorney, the Arizona courts have required an unambiguous request before a suspect to have been considered as asking for an attorney under *Miranda*. *E.g.*, *State v. Ellison*, 213 Ariz. 116, 140 P.3d 899, ¶¶ 25–29 (2006) (defendant said, "I think I might want an attorney"; court held this was equivocal request for counsel, thus detectives were not required to stop questioning him; trial court did not abuse discretion in admitting statements); *State v. Eastlack*, 180 Ariz. 243, 250–51, 883 P.2d 999, 1006–07 (1994) (court held defendant's statement, "I think I better talk to a lawyer first," was not a clear request for attorney, so the police were permitted to continue questioning defendant); *State v. Zinsmeyer*, 222 Ariz. 612, 218 P.3d 1069, ¶¶ 5–11 (Ct. App. 2009) (during interview, defendant told detectives, "[I t]hink I need a lawyer," and when they did not respond, asked them, "Do I need a lawyer"; court concluded this was not unambiguous request for counsel, thus trial court did not abuse discretion in finding defendant had not invoked right to counsel); *State v. Gay*, 214 Ariz. 214, 150 P.3d 787, ¶¶ 30–33 (Ct. App. 2007) (after officers told defendant court would appoint attorney for him at hearing next day if he could not afford one, defendant asked, "But would I get an attorney anyway?"; court held this was not unambiguous invocation of *Miranda* rights, thus officers were permitted to question him). These cases followed *Davis v. United States*, 512 U.S. 452 (1994), in which the Court held Davis's statement, "Maybe I should talk to a lawyer," was not a clear and unambiguous request for an attorney, thus officers were permitted to question Davis and were not required first to ask clarifying questions. 512 U.S. at 459–61. In light of the fact that the right to consult with counsel under *Miranda* and the right to consult with counsel under Rule 6.1(a) are not themselves rights protected by the Constitution but are instead measures to insure that the right against compulsory self-incrim-

ination (*Miranda*) and the right to due process (Rule 6.1(a)) were protected, it would appear it would require an unambiguous request before a suspect to have been considered as asking for an attorney under Rule 6.1(a).

In the present case, when Defendant and Officer Stanley were discussing the hospital's waiver of liability and consent form, Defendant asked, "Should I talk to a lawyer?" As noted above, In *Zinsmeyer,* the defendant asked the detectives, "Do I need a lawyer," and the court concluded this was not unambiguous request for counsel. 222 Ariz. 612, 218 P.3d 1069, at ¶¶ 5–11. And in *State v. Gay,* after officers told the defendant the court would appoint an attorney for him at the hearing the next day if he could not afford one, defendant asked, "But would I get an attorney anyway?" The court held this was not an unambiguous invocation of *Miranda* rights. 214 Ariz. 214, 150 P.3d 787, at ¶¶ 30–33. Thus, the courts have held the asking of a question is not an unambiguous invocation of the right to consult with counsel. In light of *Zinsmeyer* and *Gay* and the other authorities cited above, this Court concludes the trial court correctly found Defendant's question to Officer Stanley was not an unambiguous invocation of the right to consult with counsel.

Defendant notes that, right after he asked if he should talk to a lawyer, he asked for his cell phone because what he had in mind was that he would call a lawyer. The problem with this argument is Defendant did not make that intention known to Officer Stanley and Officer Stanley was unable to read Defendant's mind. This Court does not consider that request for a cell phone as an unambiguous invocation of the right to consult with counsel.

III. CONCLUSION.

Based on the foregoing, this Court concludes the trial court properly denied Defendant's Motion To Dismiss.

IT IS THEREFORE ORDERED affirming the judgment and sentence of the Scottsdale Municipal Court.

IT IS FURTHER ORDERED remanding this matter to the Scottsdale Municipal Court for all further appropriate proceedings.

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

/s/ Crane McClennen
THE HON. CRANE MCCLENNEN
JUDGE OF THE SUPERIOR COURT

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